UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

JACKSON HOSPITAL CORPORATION D/B/A KENTUCKY RIVER MEDICAL CENTER

and	Cases 9–CA–37734
	9-CA-37796
UNITED STEEL WORKERS OF AMERICA	9-CA-37795-1, 2
	9-CA-37875
and	9-CA-38084-1, 2
	9-CA-38237
ΔΝΙΤΔ ΤΙΙΡΝΕΡ ΔΝΙΝΟΙ/ΙΟΙΙΔΙ	0_CA_38468

Julius Emetu, Esq., for the General Counsel. Don T. Carmody, Esq., of Painted Post, New York, and Bryan Carmody, Esq., of Stanford, Connecticut, for the Respondent. Randy Pidcock, of Frankfort, Kentucky, for the Union.

SUPPLEMENTAL DECISION

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Jackson, Kentucky, on July 16, 17, and 18, 2007, and October 17, 2007. On September 30, 2003, the National Labor Relations Board (Board) issued its Decision and Order (340 NLRB 536) requiring, in pertinent part, the Respondent reinstate and make whole Melissa Turner (Turner), 1 for any loss or earnings she may have suffered as a result of the Respondent's unfair labor practices in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. On June 3, 2005, the United States Court of Appeals for the District of Columbia Circuit entered its judgment enforcing the Board's Decision and Order. On May 25, 2007, the Board's Regional Director for Region 9, pursuant to Section 102.54 of the Rules, issued an amended second compliance specification and notice of hearing alleging the Respondent refused to reinstate Turner and give her backpay for the applicable period, beginning August 17, 2000, and continuing through the current time. As of the first guarter of 2007, the alleged backpay owed Turner was \$100,956, not including interest. In its answer, the Respondent admits its refusal to reinstate and pay Turner backpay, but asserts that backpay is tolled for several reasons.

¹ Charging Party Anita Turner and discriminate Melissa Turner are separate individuals.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

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I. Turner's Interim Earnings

Turner, the discriminatee, was employed by the Respondent as an x-ray technician earning \$16.63 per hour. Her home was located about a mile from the Respondent's facility. Turner worked 40-hour weeks, was on-call for nights and weekends, and occasionally received overtime work. Turner's shift was from 7 a.m. to 3:30 p.m., Monday through Friday. In that role, Turner performed x-rays, CT scans, ultrasound, mammography, and general office duties.² As an x-ray technician, she came in contact with two controlled substances—contrast dye for CT patients and radioisotopes, a radioactive liquid used in x-rays. Both were regulated and released by the Respondent's pharmacy only in connection with a specific order by a radiologist.³

In August 2000, Turner participated in a strike held on the Respondent's premises. During the strike, Turner worked for St. Joseph's Hospital East (St. Joseph's) in Lexington, Kentucky. On August 17, 2000, the Respondent discharged Turner on the ground of misconduct.⁴ In 2000, prior to her discharge, Turner earned \$19,074.59 during her employment by the Respondent.⁵

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After she was discharged, Turner continued her part-time position with St. Joseph's, which is located approximately 86.5 miles from Jackson. While employed at St. Joseph's, Turner obtained part-time positions with Medical Staffing Network, Inc. (MSN). She also attended orientation at Clark Regional Medical Center (Clark) in Winchester, but worked only 3 days. Clark is located approximately 67.5 miles from Jackson.

Turner continued working for St. Joseph's until January 2001, when she resigned for a position at Samaritan Medical Center (Samaritan). Turner's reason for leaving was that the long commute made it difficult for her to pick her daughter up at school on time. The approximate hourly wage was \$18. In 2000, Turner earned \$14,255.71 with St.

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² Turner submitted evidence that she consistently received positive annual performance evaluations and regularly scheduled wage increases. (Tr. 167.) The Respondent countered with evidence that she was warned about lateness and disciplined on several occasions. (Tr. 232–233; R. Exh. 9.) Whether Turner was a good or bad employee may have had some relevance to the underlying case. It did not have any here.

³ It was clear that the nuclear medicine that Turner came in contact with as an x-ray technician was closely regulated and tracked for each patient. It was not something that was lying around in a medicine cabinet. (Tr. 463–489.)

⁴ The termination form was dated August 17, but the personnel action form stated August 15. (R. Exh. 9.)

⁵ These facts are not in dispute. (GC Exh. 8; Tr. 133–136, 143–144, 283.)

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Joseph's, \$2,017 with MSN, and \$462.40 from Clark. Turner also received accrued pay from St. Joseph's in 2001 totaling \$1,153.18.6

Turner, however, changed her mind after attending orientation and declined the position with Samaritan. The commute to Samaritan—85.5 miles—was nearly as long as the commute to St. Joseph's.⁷ Child care was a serious consideration for Turner, a single parent, whose child would get out of school at 3 p.m. As a result, Turner accepted employment with Appalachian Regional Healthcare, Inc. (Appalachian) in January 2001. The commute to Appalachian was 27.5 miles. However, by the fall of 2001, a shift in Turner's schedule from the morning shift to the afternoon shift again caused her child care complications and motivated her to seek employment elsewhere. Turner earned \$25,012.71 at Appalachian in 2001.

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In October 2001, Turner accepted a position as a radiology technologist with Gram Resources, Inc. (Gram) in Hazard. The commute to Gram was the same as that to Appalachian—27.5 miles. The work schedule, however, was consistent with Turner's child care situation and paid her an hourly wage of \$17. However, her schedule gradually expanded and she was required to work late hours and weekends. This made it difficult for Turner to meet her child care needs. In addition, her relationship with her supervisor deteriorated.⁸

Turner's personal predicament reached its pinnacle on July 6, 2002, when she was arrested on drug and fraud charges. Earlier that day, Turner was treated for a toothache at the University of Kentucky's Hospital. She was prescribed Percocet, a pain medication, and given an appointment for a tooth extraction the next day. After leaving the hospital, however, Turner went directly to Central Baptist Hospital and attempted to get an injection of Demerol, another form of pain medication. Somehow, the treating doctor learned that Turner was administered pain medication earlier that day at the University of Kentucky's Hospital and asked her about it. Turner denied receiving the earlier medication and the doctor notified law enforcement. Turner was arrested and charged with attempting to obtain a controlled substance by fraud.9 Shortly after her

⁶ The wage information contained at GC Exh. 8 conforms to the summary prepared by Jon Grove, a Board compliance officer, at GC Exh. 3, Appendix A (revised). The expenses listed on GC Exh. 3, Appendix A (revised), were appropriately derived from Appendix B (revised) and represent extra miles driven by Turner to her interim employment, above and beyond the 2-mile round trip distance that she drove to the Respondent's facility. Appendix B (revised) lists the "net" round trip distance to each of Turner's interim employers. Her expenses for each quarter of the backpay period were appropriately calculated by the number of round trip miles per quarter multiplied by the allowable mileage rate.

⁷ Mile references to one-way travel to employment locations are based on half of the "net round trip distance" as listed in GC Exh. 3, Appendix B (Revised).

⁸ I found Turner's testimony credible as to her attempts to find work, as well as the personal reasons for changing jobs during the period leading up through the second quarter of 2002. (Tr. 133–139, 143–149, 211–225.)

⁹ Given her guilty plea, I was not impressed by Turner's explanation. It is difficult to imagine, if her assertion was true and she was merely attempting to alleviate a toothache, she would have lied to medical providers and a security guard as to her treatment at another hospital Continued

arrest, Turner resigned from Gram. While employed by Gram, Turner earned \$8,125.01 in 2001 and \$19,939.58 in 2002.10

Around the time that Turner resigned from Gram, in August 2002, Turner married Jon Back. Turner was then living with Back in Wolverine, Kentucky, a town near Jackson, while Back would commute to his job for a coal company in West Virginia and return home on occasion. Turner managed to obtain employment again with MSN. While the commute to MSN was 89 miles each way, the hourly pay was slightly more than her pay at Gram and the schedule was more flexible. However, Turner worked at MSN only 10 days over the course of several weeks, earning \$2,919, before resigning that position as well. Turner's decision to resign, as well as her subsequent employment search efforts over the next 6 months, was clearly affected by her new marriage. Turner's child remained in school in Jackson during the fourth quarter of 2002 and the first quarter of 2003. However, Turner would go to live with Back for certain extended periods of time and, as such, did not make serious efforts to find employment for the next several months. 12

Turner resumed her employment search efforts on March 23, 2003, when she completed an online application for a position at Clark. In her application, she inaccurately stated that she had not worked previously for Clark. During an initial telephone interview by Sherry Wells, Clark's director of radiology, Turner stated, in pertinent part, that she got married and moved to West Virginia, where she resided from August 2002 to February 2003. Wells generated a handwritten note listing Turner's employment history in chronological order. When she came in for the follow-up

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earlier that day. (Tr. 291–292; R. Exh. 8.)

¹¹ Jon Back did not testify. While it is not disputed that Turner married Back and they moved into the same home in Wolverine, I did not find that he came home as often as every weekend. As discussed, *infra* at fn. 13, Turner went to live with Back in West Virginia for certain periods of time – enough that she would tell someone several months later that she moved to West Virginia. (Tr. 225–227, 308–309.)

¹⁰ Through Ken Holbrook, Gram resources' administrator, the Respondent offered proof that Turner was a terrible employee who once falsified her timecard and was disciplined for absences, lateness, insubordination, and refusing and denying care to patients. Accordingly, he was prepared to terminate Turner in July 2002, but did not do so because she informed him that same month that she was resigning. (Tr. 146, 230, 239–241, 339–342, 347–349, 359–360, 364–367.) The important fact here, however, is that Turner was not terminated and it was not established that she knew she was about to be terminated before leaving to accept another position.

¹² This finding is based on the fact that I did not find it credible that Turner went to live with her husband in West Virginia on only one occasion and for only a few days before returning to Kentucky. (Tr. 290–291, 666–668.) Turner failed, however, to produce any documentation of her efforts to find employment, as she was advised to do, or receipt of unemployment compensation, as she claims, during that period of time. (Tr. 672.) More importantly, as discussed, *infra* at fn. 13, I find that she told a prospective employer in March 2003 that she had been living in West Virginia since August 2002.

interview, Turner reviewed, signed the bottom of Wells' handwritten note, and was hired. 13

Turner started her full-time employment with Clark on May 5, 2003. On September 30, 2003, while still employed by Clark, the Board decided the underlying unfair labor practice case in Turner's favor. 14 The Respondent refused, however, to reinstate Turner and, instead, filed an appeal with the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals). On June 3, 2005, the Court of Appeals affirmed the Board's 2003 Order. That Order required, in pertinent part, that the Respondent reinstate Turner to her former position. The Respondent did not, however, contact Turner and reinstate her. Without contacting her to discuss the circumstances, the Respondent simply concluded that Turner's arrest and conviction precluded reinstatement under its "Discipline and Discharge" policy. Policy B.7 listed dischargeable offenses, which included a felony conviction. However, falling into the list did not automatically trigger a discharge, as the policy simply stated that such a violation "may" result in discharge. The policy also provided a process to be followed during an investigation into any alleged violation. 15

Turner's employment with Clark continued until March 28, 2004, when she went on leave pursuant to the Family Medical Leave Act (medical leave) for 5 weeks. She returned to work on April 26, 2004, and worked continuously until November 2005, when she went on medical leave again. On May 9, 2006, Turner gave birth to her second child. At that point, however, Turner's position was open and she was eligible for rehire. Turner's position remained open until May 22, 2006, but she did not receive medical clearance to return to work until June 25, 2006. At Clark, Turner earned \$25,029.32 in 2003, \$46,964.30 in 2004, \$54,900.30 in 2005, and \$257.18 in 2006.16

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¹³ Turner denied telling Wells that she lived in West Virginia for any significant amount of time in 2002–2003. (Tr. 670.) I did not, however, credit such testimony and relied on Wells' version of the interview. Wells' testimony was consistent with the note, which was made in the regular course of business, and contains the indicia of reliability. (R. Exh. 3, 16; Tr. 227, 288, 331, 649–650, 669–670.) Moreover, Turner lied on the application as to whether she worked previously at Clark. (Tr. 323–326.) As such, since Turner was in West Virginia for significant periods of time between August 2002 and February 2003, and her alleged efforts to find work were based in Kentucky, I find that she did not undertake any serious efforts to find work anywhere.

¹⁴ 340 NLRB 536.

¹⁵ I did not find it credible that Bevins based his decision on any criteria other than the fact that Turner was convicted of a felony. He testified that he took into account the following dischargeable offenses listed in the disciplinary policy—a felony conviction, the solicitation of drugs, fraud, and falsifying medical information. Of those listed, however, only a felony conviction is included as a dischargeable offense. Furthermore, Bevins testified that he only learned of Turner's conviction in 2005. That assertion, however, was based on uncorroborated hearsay from a former employee, and the timing as to when he allegedly learned about Turner's arrest and conviction was too coincidentally close to the date that the court of appeals reaffirmed the Board's Order requiring the Respondent reinstate Turner. (Tr. 413–416, 419–420, 428–435, 438, 449–450, 453–454, 476–477, 482–484, 487–488; R. Exh. 8; GC Exh. 5.)

¹⁶ I based this finding on Turner's credible and unrefuted testimony regarding her pregnancy Continued

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For the next year, Turner remained unemployed, collected unemployment compensation benefits, moved into her parents' home, and collected child support from Back, whom she divorced in August 2006. In accordance with her responsibilities as a recipient of unemployment compensation benefits, Turner made numerous attempts to find employment. Those efforts included inquiries with her former employer at Clark, Appalachian, Gram, University of Kentucky's Hospital, Jupiter Health Clinic in Jackson, and medical offices in Winchester, Hazard, and Jackson. In July 2007, Turner finally obtained employment as an ultrasound technologist with Ace Clinique in Hazard, Kentucky. Turner remains employed at Ace Clinique, earning \$17.00 per hour.¹⁷

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II. The Compliance Specification

The burden is on the General Counsel to show the gross backpay due, that is, the amount of wages the discriminatee would have received but for the employer's illegal conduct." *J. H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 230–231 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973); *La Favorita, Inc.*, 313 NLRB 902 (1994). The General Counsel has discretion in selecting a formula that will closely approximate backpay and need only establish that the gross backpay amounts specified are reasonable and not an arbitrary approximation. *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Mastell Trailer Corp.*, 273 NLRB 1190, 1190 (1984). Once established, it is the employer's burden to establish defenses to mitigate its backpay liability by demonstrating the willful loss of interim earnings to be deducted from gross backpay. *Basin Frozen Foods, Inc.*, 320 NLRB 1072 (1996).

Jon Grove, a Board compliance officer, prepared the amended second compliance specification based on the Order in the underlying case, Turner's W-2 forms, payroll records from the Respondent, Social Security Administration records, payroll records from interim employers, and mileage calculations obtained from the well-known Mapquest.com internet website. The gross backpay calculation was based on Turner's prorated earnings from the Respondent during 2000 and converted to an average weekly salary for that year. Grove's then calculated backpay through the first quarter of 2007 by applying wage increases afforded the Respondent's employees

and the related complications that kept her out of work for this period of time. (Tr. 151, 197; GC Exh. 8.)

¹⁷ In contrast to her earlier period of unemployment in 2002, Turner documented her unemployment compensation benefits received in 2006. (GC Exh. 12.) Given her responsibilities under the unemployment compensation benefits system, as well as the specificity as to the individuals with whom she spoke at the various hospitals, I found it credible that Turner made serious efforts to obtain employment during this period. (Tr. 131–132, 151–152, 155, 197, 242–254, 373–374, 642–643.) As to the discrepancy between her and Barry Linderman, her former supervisor at Clark, as to whether she contacted him, I credited Turner's version. In contrast to Turner, Linderman hedged as to whether Turner contacted him after she left his employ ("she may have called me") and his tone conveyed a sense of significant resentment toward Turner. (Tr. 334.)

through the first quarter of 2007.¹⁸ Turner's backpay was either eliminated or reduced in proportion to the time that she did not work during the fourth quarter of 2005, the first quarter of 2006, and the period that she was on maternity leave—October 28, 2005, through June 25, 2006. The net interim earnings were deducted from the gross backpay to yield the net backpay that Turner is owed through the first quarter of 2007—\$100,532, plus accrued interest.¹⁹

The Respondent does not challenge the formula or the calculations used to arrive at the gross backpay as set forth in the compliance specification. It does, however, contend that further offsets are in order. Although extensively explored by the Respondent, Turner's checking accounts failed to reveal additional sources of income from interim employers warranting further offsets to backpay. Turner's accounts at the Citizen's Bank in Jackson, Kentucky, and Central Trust/Winchester Bank in Lexington, Kentucky, reflected numerous deposits relating to child support from her ex-husband (\$930 deposited on July 13, 2006, \$7,868 deposited on September 15, 2005, \$900 deposited on June 28,2005, \$700 deposited on February 14, and \$300 on February 21, 2005); a long term insurance disability payment (\$3,062.05 deposited on May 24, 2006); income tax refunds (\$2,355.05 deposited on February 3, 2001); and a family inheritance (\$1,000 deposited on March 27, 2001).²⁰

With the exception of periods for which Grove tolled backpay because Turner was either pregnant or suffering from related complications, there was only one period of time in which the Respondent demonstrated a willful loss of earnings by Turner—the last quarter of 2002 and first quarter of 2003. Grove estimated the gross backpay during each of those quarters at \$10,477. During this period of time, Turner essentially removed herself from the job market by spending significant periods of time in West Virginia with her husband. Her situation during this period of time was corroborated by her representations during the job interview with Sherry Wells, Clark's director of radiology. Since Turner failed to mitigate during this period of time, backpay is tolled for this portion of the backpay period. See *St. George Warehouse*, 351 NLRB No. 42, slip op. at 3 (2007). Accordingly, I have reduced her gross backpay by \$20,954. The gross backpay, as stated in the compliance specification, is reduced to \$237,016.

As to the remainder of the backpay period, the Respondent failed to establish a willful loss of earnings on the part of Turner. Simply showing that Turner, at various times during the backpay period, failed to obtain or retain interim employment, does not meet this burden. *Black Magic Resources*, 317 NLRB 721 (1995). Turner did leave several interim jobs for comparable positions at other facilities, but only after the schedules changed dramatically. The new positions were either located closer to her home and/or enabled her to pick up her child after school—not unreasonable considerations on the part of a single parent attempting to be self-supporting. *Flannery*

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¹⁸ It is not disputed that the Respondent provided Grove with such information. (GC Exh. 3, Appendix A.)

¹⁹ Grove first met with Turner on November 17, 2003, and advised her to document all employment search efforts. (GC Exh. 6–26; Tr. 41–45, 48–51.)

²⁰ (R. Exh. 20–21; Tr. 270, 600–625).

Motors, Inc., 330 NLRB 994, 995 (2000) ("good faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced . . . by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment."). As such, Turner made a good-faith effort to obtain or retain employment, which is good enough. Fabi Fashions, 291 NLRB 586, 587 (1988); Arlington Hotel, 287 NLRB 851 (1987); NLRB v. Madison, 472 F.2d 1307, 1319 (D.C. Cir. 1972); NLRB v. Arduni Mfg. Co., 394 F.2d 420, 422–423 (1st Cir. 1968). With respect to the period during and after the third quarter of 2006—after she lost her position at Clark due to extended medical leave resulting from her pregnancy—Turner's job search efforts are further evidenced by the fact that she applied for and received unemployment compensation benefits during this time. The Board has found that a discriminatee's receipt of unemployment benefits is corroborative of reasonable efforts to seek interim employment. Superior Protection, Inc., 347 NLRB No. 105, slip op. at 3 (2006); Birch Run Welding, 286 NLRB 1316, 1319 (1987).

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III. The Respondent's Refusal to Reinstate Turner Because of her Felony Conviction

The Respondent also contends that backpay liability was tolled on August 27, 2002, when Turner was convicted of a felony. Specifically, the Respondent contends that it had a policy precluding the employment or continued employment of any individual convicted of a felony. That policy, however, simply lists violations which "may" result in an employee's discharge.²¹

Whether to reinstate Turner after her conviction on a controlled substance-related charge was not an issue of first impression for the Respondent. In 1996, Carol Hudson, a registered nurse in the Respondent's medical-surgical department, was arrested and subsequently convicted of a felony for growing and selling marijuana from her home. At the time of her felony drug conviction, the Respondent allegedly had a policy requiring that employees convicted of a felony be terminated. Hudson did not report her felony drug arrest to the Respondent until after she was convicted. After discussing the matter with Hudson's attorneys, Bevins investigated the circumstances of her arrest, spoke with her probation officer, and agreed to retain Hudson, "with conditions to work by." Hudson subsequently resigned in 2002, but that was unrelated to her narcotics arrest or the related "employment conditions." Hudson, like Turner, had been in constant contact with patients. It is noteworthy, however, while Hudson's nursing duties included administering various drugs to patients, Turner's exposure to controlled substances as an x-ray technician was limited to administering contrast dye and a radioactive liquid.²²

In addition to Hudson and Turner, during the period of 2000–2007, at least 24 other employees have informed the Respondent of their abuse of controlled

²¹ Section 5.0 of policy B.7 became effective on October 1, 1997, and was apparently still in force as of 2005. (GC Exh. 5.)

²² The versions provided by Hudson and Bevins as to this development were consistent. (Tr. 77–87, 119, 479–480; GC Exhs. 4–5, 28.)

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substances. In accordance with its employee assistance policy, the Respondent has not discharged any of them. Instead, it has provided them with in-house counseling and, if necessary, drug rehabilitation services. Most notably, it is well known that one of the Respondent's staff physicians is currently enrolled in a drug rehabilitation program, yet continues in the Respondent's employ and treats patients on a regular basis.²³

Based on the foregoing, the evidence demonstrates that the Respondent applied its disciplinary policy to Turner in an arbitrary and capricious manner. Unlike Hudson's situation, the Respondent failed to even consider the circumstances of Turner's conviction. Like Hudson, Turner also had an explanation for her dereliction, which she explained to the court in her plea application. The Respondent, clearly affected by the pending litigation with Turner, deliberately misconstrued its disciplinary policy in order to curtail its backpay liability. Accordingly, there is no legitimate justification for the Respondent's refusal to reinstate Turner and provide her with the accrued backpay.

On these findings of fact, conclusions of law, and on the entire record, I issue the following recommended²⁴

²⁰ ORDER

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The Respondent, Jackson Hospital Corporation d/b/a Kentucky River Medical Center, its officers, agents, successors, and assigns, shall, consistent with the compliance specification as modified by the foregoing findings, satisfy the obligation to make whole Melissa Turner by paying her the amount of \$79,577, together with interest accrued to the date of payment, as computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

Dated, Washington, D.C. February 26, 2008

Michael A. Desec

Michael A. Rosas Administrative Law Judge

²³ Given that the Respondent stipulated to these extremely revealing statistics, I precluded the General Counsel from pursuing unnecessarily cumulative testimony as to the individual circumstances of each employee involved. The stipulation also enabled me to avoid inquiry into the personal circumstances of numerous individuals who approached the Respondent's employee assistance program in confidence, while enabling the General Counsel to establish its point—that the Respondent has a policy of providing its drug-addicted employees with counseling and other rehabilitation services, rather than discharging them. (Tr. 545–553, 565, 576–581.)

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.